IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:16-cv-25-TDS-JEP

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.; CENTER FOR FOOD SAFETY; ANIMAL LEGAL DEFENSE FUND; FARM SANCTUARY; FOOD & WATER WATCH; GOVERNMENT ACCOUNTABILITY PROJECT; FARM FORWARD; and AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, **Plaintiffs,** **v.** **ROY COOPER, in his official capacity as Attorney General of North Carolina, and CAROL FOLT, in her official capacity as Chancellor of the University of North Carolina-Chapel Hill,** **Defendants.**	)	**BRIEF OF AMICI CURIAE** **Professor Erwin Chemerinsky** **Professor Jack Preis**

INTRODUCTION

Plaintiffs challenge a state law that, if they were to violate it, would impose liability on them for engaging in constitutionally protected conduct. Such suits have been litigated in the federal courts for well over a century. *See Ex Parte Young*, 209 U.S. 123 (1908). Despite this, Defendants argue that the Plaintiffs' suit must be dismissed because they lack standing and because their suit violates North Carolina's sovereign immunity.

Though the Defendants' standing and sovereign immunity arguments are nominally separate, they are both based on a single error: the belief that a plaintiff may not challenge a state law infringing on free speech unless the named defendant has the power and present intent to enforce the law against the plaintiff. The Defendants' arguments hinge on their role in the enforcement of the law.

This Brief explains how a state officer's enforcement power affects matters of standing and sovereign immunity. The Defendants' have the power to initiate proceedings against Plaintiffs' and that power, on its own, presents a credible threat to Plaintiffs, and thus a case or controversy. *See N. Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999). The Plaintiffs therefore have standing.

Because standing exists, the Defendants lack sovereign immunity. The inquiry into a defendant's connection with a state law for sovereign immunity purposes is functionally identical to the inquiry into his connection with the state law for standing purposes. The two inquiries have similar purposes, employ similar criteria, are applied in the same cases, and nearly always lead to the same results. The only difference is that the special relationship inquiry arose long before standing doctrine developed. Once standing developed and could accomplish the same ends as the special relationship inquiry, the special relationship inquiry disappeared from Supreme Court jurisprudence. Thus, because the Plaintiffs have standing to sue the Defendants in this case, the Defendants also lack sovereign immunity.

In compliance with Local Rule 7.5(d), *Amici* state that this brief was not written by counsel for either party, in whole or in part. No person or party contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

I. THE PLAINTIFFS HAVE STANDING

To have standing, a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo v. Robins*, __ U.S. ___, 136 S.Ct. 1540, 1547 (May 16, 2016) (citations omitted). As explained below in Part A, the Plaintiffs are presently suffering an injury in fact. In First Amendment free expression cases such as this, it is immaterial whether a state official has formally announced an intention to file suit against the Plaintiffs; rather, the mere existence of the state law impedes the Plaintiffs' exercise of their rights, thus causing them an cognizable injury. Additionally, as explained in Part B below, the Plaintiffs' injury directly stems from the enforcement power possessed by the Defendants, and their injury will thus be redressed by an order prohibiting the Defendants to exercise their authority under the statute.

A. Injury in fact

The Plaintiff's injury in this case can be boiled down to four simple points: (1) an injury in fact is "an invasion of a legally protected interest," *Id.* at 1548, (2) the First Amendment protects a person's interest in free expression; (3) state laws that impose penalties on persons for free expression invade a "legally protected interest"; and (4) the Anti-Sunshine law imposes penalties on those who engage in free expression. *See Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) (statute limiting the use of recording devices is a speech-based statute).

Despite this straightforward explanation of the Plaintiff's injury, the Defendants nonetheless claim that the Plaintiffs have not suffered an injury because the Defendants have not yet, and may not ever, penalize the Plaintiffs for engaging in free speech. Def. Br. p. 18. Without a fear of imminent prosecution, the Defendants argue, the Plaintiffs cannot reasonably claim that their right to free expression has been invaded. The Defendants' argument overlooks well-established Fourth Circuit precedent.

In *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 709 (1999), the North Carolina Right to Life Committee ("NCRL") was concerned that its issue advocacy "might violate North Carolina's election law." As in the present case, North Carolina officials moved to dismiss on the ground that the NCRL could not reasonably fear prosecution under the law. "[I]n the twenty-five years since the statute's enactment," the officials argued, they had "never interpreted it to apply to groups engaging only in issue advocacy." *Id.* at 710. As a result, in the State's view, NCRL's fear of prosecution was hypothetical and insufficient for standing.

The Court of Appeals disagreed and found that a plaintiff has standing to challenge a law that could create liability for its speech. The Court declared: "When a plaintiff faces a credible threat of prosecution under a criminal statute he has standing to mount a pre-enforcement challenge to that statute. A non-moribund statute that facially restricts expressive activity by the class to which the plaintiff belongs presents such a credible threat, and a case or controversy thus exists in the absence of compelling evidence to the contrary. *This presumption is particularly appropriate when the presence* *of a statute tends to chill the exercise of First Amendment rights*." *Id.* (internal quotation marks and citations omitted) (emphasis added).

In the present case, the Plaintiffs are not challenging a law that has been on the books for twenty-five years but never applied to them. They are challenging a statute that was enacted approximately one year ago. If NCRL can reasonably fear prosecution under a decades-old statute that had not yet been applied to them, surely the Plaintiffs' fear of prosecution is reasonable as well. While it is true that *North Carolina Right to Life* involved a fear of criminal prosecution and the present case only involves a fear of civil prosecution, the distinction is immaterial for the purposes of standing. Although criminal penalties are often deemed more serious than civil penalties, in the First Amendment context the calculus of risk is typically reversed. A protester at city hall may be charged with misdemeanor trespass and perhaps be forced to pay a small fine. The Plaintiffs in this case, however, may face a civil judgment of many millions of dollars—an amount that could easily cripple their national organizations.

In cases where the right to free expression is at issue, an injury exists simply because a statute has been enacted that, if applied to the plaintiff, would violate the plaintiff's First Amendment rights. It does not matter whether the state is about to bring suit against the plaintiff so long as it has the power to do so. Under well-established law, the Plaintiffs in this case have suffered, and continue to suffer, injury in fact.

B. Causation and Redressability

Injury is necessary for standing, but not sufficient. A plaintiff's injury must also be "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). These requirements have been labeled *causation* (the plaintiff must allege that the defendant's conduct caused the harm) and *redressability* (the plaintiff must allege that a favorable court decision is likely to remedy the injury). While injury in fact focuses on the plaintiff, causation and redressability focus on the defendant.

To meet standing requirements, it is sufficient to allege that a defendant's conduct is the "but for" cause of the injury suffered. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74-75 (1978). A lack of causation or redressability can be found where the plaintiff's injury "results from the independent action of some third party not before the Court." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). When an unnamed third party is the source of a plaintiff's injury, there is no reason to believe that an order of "prospective relief will remove the harm." *Warth v. Seldin*, 422 U.S. 490, 505 (1975).

In this case, the Plaintiffs' injuries do not stem from the "independent action of some third party not before the Court." It is instead the existence of the Anti-Sunshine law that creates liability for speech and thus chills expression. And if the Plaintiffs engage in constitutionally protected speech, it is the Defendants themselves who have authority to initiate suits against them. The North Carolina Attorney General represents the state in affirmative civil litigation, and the Chancellor of the University of North Carolina at Chapel Hill is an employer who is required to initiate all suits on behalf of that entity. *See* Def. Br. p. 10, Def. Ex. 1. Precluding the Defendants from initiating lawsuits under the Anti-Sunshine law would plainly "remove the harm" posed by the threat of facing such a lawsuit. This is all that is required for standing under Article III.

Despite this simple fact, the Defendants argue Plaintiffs lack standing by playing a shell game. "We have *some* authority to initiate litigation," they, in effect, argue, "but we don't have the final say in whether a lawsuit may actually be filed." To the extent this is true, it is irrelevant. The Defendants cannot hide from a lawsuit, or have one dismissed for lack of standing, by splitting their enforcement authority into smaller pieces. Moreover, when the court has held that a "third party not before the court" thwarts standing, it has been because the third party is a private actor that is not required to obey the Constitution. But that is not relevant here where it is the actions of the State of North Carolina that caused the harm and where striking down the law would remedy the injury.

Plaintiffs' speech is chilled by the existence of the Anti-Sunshine law. Defendants are necessary parts of a process through which the State can bring about unconstitutional litigation under that law. A judgment against Defendants would plainly eliminate the threat of such litigation. Plaintiffs therefore have standing to bring this suit.

II. THE SPECIAL RELATIONSHIP INQUIRY IS FUNCTIONALLY EQUIVALENT TO THE STANDING INQUIRY

The Court's finding that standing exists should lead to the finding that the Defendants lack sovereign immunity. Sovereign immunity, according to the Defendants, depends on whether they have a "special relationship" to the state law in this case. Def. Br. at 8. Although caselaw does not precisely define the special relationship inquiry, a closer analysis of its history and modern application reveals that it is functionally equivalent to the causation and redressability components of the standing inquiry.

This Part begins with a discussion of the origin and development of the special relationship inquiry, then turns to the origin and purpose of the standing inquiry, and finally demonstrates that the two inquiries are effectively equivalent.

A. The Origin and Development of the Special Relationship Inquiry

The law of state sovereign immunity provides states immunity in federal courts. Such immunity, however, only extends to suits in which the state is the real "party in interest." *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). Sometimes, it is easy to determine whether the state is the real party in interest. If a state is named as an actual defendant, for example, then the state itself is plainly a party and immunity therefore attaches. In other cases, the analysis is not so simple. If a suit names a state *officer* instead of the state itself, the general rule is that the state is the real party in interest in suits for monetary relief, *see Edelman v. Jordan*, 415 U.S. 651, 666 (1974), but not in suits seeking equitable relief, *see Ex Parte Young*, 209 U.S. at 155-56. Thus, for well over a century, sovereign immunity has not stood in the way of equitable actions against state officers accused of unconstitutional acts.

For the great majority of suits challenging unconstitutional state action, the above rules are sufficient to resolve any question of sovereign immunity. Occasionally, however, there arises a question about whether the state officer named in the suit is the appropriate officer. This is a reasonable concern, for it would make little sense to sue the governor's chauffeur when it is the governor herself who is threatening unconstitutional action. This aspect of sovereign immunity law is commonly known as the "special relationship" inquiry. It seeks to determine whether the state officer sued has some connection with the unconstitutional action alleged.

The special relationship inquiry is commonly traced to *Fitts v. McGhee*, 172 U.S. 516 (1899). *Fitts* involved an Alabama statute that set the maximum price toll operators could charge for passage across the "Florence Bridge," a privately owned bridge connecting two counties in the state. *Id.* at 516. In addition to setting the maximum price, the statute also provided a remedy to travelers who had been overcharged. Travelers subjected to an unlawful toll could file a civil action against the toll operator and obtain liquidated damages of "$20 for each offense." *Id.*

Unhappy with the new statute, the owners of the Florence Bridge brought suit in federal court alleging that the law deprived them of their constitutional right to property without due process. *Id.* at 516-17. The bridge owners named as defendants "the offices of attorney general of Alabama and solicitor of the Eleventh judicial circuit of the state," and sought an injunction barring them from "prosecut[ing] any indictment or criminal proceeding against any one for violating the provisions" of the state law. *Id.* at 524.

The Supreme Court dismissed the suit as violative of Alabama's sovereign immunity. The problem, according to the Court, was that the plaintiffs failed to name state officials that had "any special relation to the particular statute alleged to be unconstitutional." *Id.* at 530. The enforcement scheme contemplated by the statute involved civil suits brought by travelers on the bridge against toll operators on the bridge. The toll operators could reasonably fear civil suits by travelers if they charged their desired toll, but they could *not* fear civil suits by the attorney general or a regional solicitor. A different result would likely have resulted if the attorney general himself, engaged in official business for the state, demanded passage across the bridge for the reduced price. In that circumstance, the state officer, if forced to pay a higher price, would have acquired a right of civil enforcement against the toll operator. That would have changed everything, because the law both before and after *Fitts* was clear that when a government official possesses the power to sue a person for actions protected by the Constitution, a federal court may prohibit the state official from bringing suit. *See Ex Parte Young*, 209 U.S. at 155-56; *Smyth v. Ames*, 171 U.S. 361 (1898).

Under *Fitts*, if a person desires to engage in constitutionally protected conduct (e.g., charging a toll of his choice), and such conduct would give a government official the power to bring suit, that person may seek an injunction in federal court prohibiting the state officer from bringing suit. If no government official would acquire a right of action, then the person may not bring a pre-enforcement challenge.

The special relationship inquiry in *Fitts* was not simply an exercise in semantics or arbitrary rules. The inquiry was necessary to protect states from constant challenges to state laws. Were there no such inquiry, the Court observed, "then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general . . . That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons." *Id*. at 530.

As important as *Fitts* is to understanding the special relationship inquiry, just as important is an understanding of what happened *after Fitts*—or more accurately, what did not happen. In the 117 years since deciding *Fitts* in 1899, the Supreme Court has applied the special relationship test in only *two* cases, with the final one being decided 99 years ago. *See Louisville & N.R. Co. v. Greene*, 244 U.S. 522, 531 (1917); *Ex Parte Young*, 209 U.S. 123, 156-57 (1908). Moreover, in *neither* of those two cases did the Court hold that a special relationship was lacking. Thus, *Fitts* was not only the first case but also the *last* case in Supreme Court history holding that a defendant's connection with an unconstitutional law was insufficient to overcome sovereign immunity.

To be sure, the issue has periodically arisen in the lower courts in modern times. The common standard is that the government official named as a defendant must have "some connection with the enforcement [of the state law]. *Lytle v. Griffith*, 240 F.3d 404, 409 (4th Cir. 2001). It is not enough that the official have the "[g]eneral authority to enforce the laws of the state." *Waste Mgmt. Holdings v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001). Rather, there must be a "real, not ephemeral, likelihood or realistic potential that the connection will be employed against the plaintiff's interests." *Lytle*, 240 F.3d at 413 (Wilkinson, C.J., dissenting) (quoting *1st Westco Corp. v. School Dist. of Philadelphia*, 6 F.3d 108, 113 (3d Cir.1993)); *see also Harris v. McDonnell*, 988 F. Supp. 2d 603, 608-09 (W.D. Va. 2013) (applying "realistic potential" criteria stated in *Lytle*). Such a connection is necessary to "ensure that a federal injunction will be effective with respect to the underlying claim." *S. Carolina Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 333 (4th Cir. 2008).

Although there is some precedent supporting the special relationship inquiry in the lower courts, the paucity of precedent in Supreme Court casts uncertainty on the inquiry. It is hard to believe that, in the enormous body of state sovereign immunity law developed by the Court since 1917, the special relationship inquiry could be *both* an essential component of sovereign immunity law *and* never mentioned since 1917. This gives rise to a reasonable question: does the identity of the defendant no longer matter in equitable actions against government officers? The answer is "probably not." The better answer is that the special relationship inquiry has been overtaken by broader set of inquiries developed to resolve similar problems. It is to this development that this Brief now turns.

B. The Origin and Development of the Standing Inquiry

Today, it is universally recognized that a plaintiff must have standing to bring suit in federal court. "Standing ensures 'there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party.'" *Summers v. Earth*

Island Inst., 555 U.S. 488, 493 (2009) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974)). Despite its universal recognition, standing law is a more recent development than the law of sovereign immunity. Indeed, it was not until the 1940s that a distinct body of standing law developed in the federal courts.

Prior to the 1940s, the federal courts relied on pleading rules to ferret out suits that did not present an actual case or controversy. To plead a case in federal court in the nineteenth century, a plaintiff must present his case "in the form prescribed by law." *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 819 (1824). Importantly, there was not a single form, but rather many forms. For example, if a plaintiff alleged the loss of money as a result of a breach of contract, his allegations fit within a form—known as "assumpsit"—that courts were prepared to act upon. Similarly, if a plaintiff alleged that he suffered a broken arm due to the defendant's misbehaving horse, his allegations fit within a form—known as "trespass on the case"—that courts were also prepared to act upon. In contrast, if the plaintiff could only allege the loss of money from a card game, or an annoyance with the defendant's horse, his case would not take on a form that courts were prepared to act upon.

For most of the nineteenth and first part of the twentieth centuries, the forms of action worked tolerably well in federal court. In the 1930s, however, a movement arose to abolish the forms of action. The reasons for the movement are unimportant here; what matters is simply that the movement succeeded with the adoption of the Federal Rules of Civil Procedure in 1938. For our purposes, the most important of the newly adopted rules was Rule 2. Rule 2 declared that there shall be only "one form of action, to be known as the civil action." Fed R. Civ. P. 2 (1939).

With the forms of action abolished and replaced by a single generic form, a concern quickly arose: how would the federal courts screen out cases that did not belong? Unlike the forms of action, a "civil action" had no requirements of form whatsoever. Without such limitations, a New Yorker could conceivably sue a Californian for pollution wholly contained within California. Or just as worrisome, any person could sue any government in the country if the government engaged in unconstitutional action. Few thought that the Federal Rules were intended to open the courthouse doors that wide, but with the forms of action gone, it was not clear how the doors could ever be shut again.

The solution was the doctrine of standing. It is unnecessary here to chronicle the year-by-year development of standing. Rather, what is important here is that the doctrine evolved to limit the suits that can be brought in federal court. Today the doctrine requires that the plaintiff have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, __ U.S. ___, 136 S.Ct. at 1547.

Among the three elements of the modern standing inquiry, the second and third elements deserve special attention in the present case. Though phrased in terms of "traceab[ility]" and "redress[ability]," the elements, in effect, require an inquiry into the named defendant's connection with the injury alleged. For example, if a plaintiff fears a criminal prosecution for loitering, her fear is likely "fairly traceable" to the decisions of the local prosecutor. If the plaintiff mistakenly sues the head of a state agency charged with insurance regulation, she will lack standing because her reasonable fear of a local criminal prosecution is not "traceable" to the actions of the state agency. Relatedly, if the head of the insurance agency were ordered not to prosecute the plaintiff for loitering, the order would not "redress" the plaintiff's grievance. She would still face the prospect of prosecution by the local district attorney.

Under Supreme Court precedent, traceability and redressability problems are frequently identified by asking whether the plaintiff's injury "results from the independent action of some third party not before the court." *Simon*, 426 U.S. at 41-42. In the example above, the plaintiff's injury—a reasonable fear of prosecution—stems from *the prosecutor's behavior*, and not anyone else. Because the prosecutor is a "third party not before the court," the plaintiff lacks standing.

Numerous cases can be cited to illustrate this rule. *See, e.g., id.*; *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). One of the most prominent cases is *Allen v. Wright*, 468 U.S. 737 (1984). In *Allen*, the parents of black school children sued the Commissioner of the Internal Revenue Service for causing *de facto* racial segregation in many public schools. By unlawfully granting tax benefits to private schools engaged in racial discrimination, the IRS was enabling racially discriminatory private schools to compete more effectively with public schools, thus allowing white school children to more easily migrate from integrated public schools to segregated private schools. The result was a new era of segregation in many inner-city public schools.

The Supreme Court denied standing because the plaintiffs failed to show causation and redressability. The specific cause of segregation was the decision of white parents to move their children to private schools, *not* the IRS Commissioner's enforcement decisions. Put differently, if the IRS were to fully enforce the tax code, it was impossible to say whether white parents would continue to send their students to private schools or instead return them to public schools. Perhaps white parents possessed sufficient wealth to do so, perhaps not. Thus, because segregation depended significantly on the decisions of the white parents, the plaintiffs' injury "result[ed] from the independent action of some third party not before the court." *Id.* at 757.

In sum, the standing doctrine arose *after* the special relationship inquiry but for a similar purpose: to limit the suits that could be brought in federal court. Additionally, the standing doctrine, like the special relationship inquiry, pays close attention to whether the named defendant is properly connected with alleged harm or, put differently, whether the harm "result[ed] from the independent action of some third party not before the court." *Id.*

C. The Functional Equivalency of the Special Relationship and Standing Inquiries

In light of the prior discussion, it should be clear that the special relationship inquiry and the standing inquiry are functionally equivalent. Five separate points support this conclusion.

First, both inquiries have a similar purpose. The "special relation requirement ensures that the appropriate party is before the federal court" so that "a federal injunction will be effective with respect to the underlying claim." *Limehouse*, 549 F.3d at 332-33.

Similarly, the standing inquiry focuses on the role of the defendant so that an injunction will "*affect[] the behavior of the defendant towards the plaintiff*." *Rhodes v. Stewart*, 488 U.S. 1, 4, 109 S. Ct. 202, 203, 102 L. Ed. 2d 1 (1988) (emphasis in original). Thus, both inquiries are based on the concern that injunctive relief actually have effect.

Second, both inquiries employ similar criteria. The special relationship inquiry focuses on whether the named defendant has the "some connection with the enforcement [of the state law]." *Lytle,* 240 F.3d at 409. The connection must be such that there exists a "real, not ephemeral, likelihood or realistic potential that the [defendant will act] against the plaintiff's interests." *Id.* at 413 (Wilkinson, C.J., dissenting). The standing inquiry focuses on whether the defendant is the actual source of the plaintiff's grievance, or whether the grievance stems from the "independent action of some third party not before the court." *Allen*, 468 U.S. at 757. Thus, both inquiries focus on whether the defendant is the true source of the plaintiff's injury.

Third, courts frequently note that the special relationship and standing inquiries overlap. For example, in *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1049 (6th Cir. 2015), the Sixth Circuit concluded that a denial of "claims of Eleventh Amendment immunity also confirms our jurisdiction to adjudicate this case [under standing law]." Similarly the Tenth Circuit has noted that "[w]hether the Defendants have enforcement authority [for the purpose of standing] is related to whether, under *Ex parte Young*, they are proper state officials for suit." *Kitchen v. Herbert*, 755 F.3d 1193, 1201 (10th Cir. 2014). *See also Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th

Cir.2004). ("[w]hether [state] officials are . . . proper defendants in [a] suit is really the common denominator of" the special relationship and standing inquiries); *Okpalobi v. Foster*, 244 F.3d 405, 431 (5th Cir. 2001) ("The majority and dissent trade arguments over the 'nexus between defendants and the statute at issue.' If this is the same inquiry as standing, as it appears to be, we should be applying the doctrine of standing.") (Higginbotham, J. concurring).

Fourth, not only do courts *declare* the two inquiries related, but *actual practice* reveals them to be related as well. In contemporary cases where the special relationship issue is adjudicated, standing is always adjudicated as well. *Amici* have uncovered no case in which a court has held that the plaintiff sued the proper defendant for the purposes of standing, but sued the wrong defendant for the purposes of sovereign immunity.

Fifth, if the special relationship inquiry is more rigorous than the standing inquiry, then it will effectively abrogate cases in which standing rules have been relaxed *precisely* to allow parties to bring free speech claims. This is one of those cases. It would make little sense for the Supreme Court, on the one hand, to create special standing rules for free expression cases and then, on the other hand, to allow lower courts to abrogate those rules by demanding a special relationship beyond what the standing rules require.

The only logical conclusion is that the special relationship inquiry is functionally equivalent to (or, at least, less demanding than) the standing inquiry. It follows that the Defendants have a special relationship with the enforcement of North Carolina's Anti-Sunshine law. The Plaintiffs wish to engage in constitutionally protected speech that would subject them to liability at the hands of the Defendants named in this suit. As noted in Part I, the Plaintiffs' fear of liability is directly traceable to the powers held by the Defendants. Further, an injunction prohibiting the Defendants from exercising those powers will redress the Plaintiffs' injury. The Court should therefore hold that the Plaintiffs have standing and that the Defendants are not entitled to sovereign immunity.

CONCLUSION

For the reasons stated above, the Court should hold that the Plaintiffs have standing to bring this suit and that the Defendants lack sovereign immunity.

Respectfully submitted, this the 24th day of August, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief with the Clerk of the Court for the United States District Court for the Middle District of North Carolina using the Court's CM/ECF system, which will send notice all participants in the case that require service.

Date: August 24th, 2016.

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